SUPREME COURT, U. S.

No. 71-216

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARSHALL G. WEST
Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Marshall G. West, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this cause on July 12, 1971.

OPINION BELOW

The opinion of the Court of Appeals is reported in Fed. (2nd) . A copy of the opinion and judgment of the Court of Appeals is appended as Appendix I.

JURISDICTION

Jurisdiction to review by writ of *certiorari* the judgment of said Court of Appeals entered July 12, 1971, is invoked under the provisions of 28 U.S.C.A. Section 1254.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The basis for Federal jurisdiction in the United States District Court was by virtue of an indictment returned against petitioner by the Grand Jury charging petitioner with violation of Section 1341, Title 18, of the United States Code.

STATEMENT OF THE CASE

Petitioner, an attorney, was jointly indicted with two co-defendants for violation of 18 U.S.C. § 1341, being a charge of obtaining money and property by fraudulent and false pretenses through the use of the United States mails. By order entered the 16th day of October, 1970, Petitioner was adjudged guilty, after a jury verdict, and was sentenced to a term of eighteen months custody of the Attorney General of the United States. The judgment of conviction was affirmed on July 12, 1971 by the United States Court of Appeals for the Fourth Circuit. Petitioner, along with his two co-defendants, were the principal stockholders and officers of West Virginia Discount Furniture Corporation, with their offices and place of business located in Pineville, West Virginia. They operated a discount furniture store, and the store was managed by one of the co-defendants, David W. George. In May of 1967, a financial statement of the corporation was prepared showing the porported assets and liabilities of this corporation. The financial statement listed as one of the assets a parcel of real estate which the corporation did not own. In addition, the statement showed that the corporation was earning a profit, when in fact it did

not earn any profit, In May of 1967, Delmonico International Corporation of Maspeth, New York, received the financial statement at their office, and based upon the information therein, extended credit to the corporation and shipped merchandise to be sold by that corporation,

The evidence in the case is not clear as to whether Delmonico received the financial statement in the mails. The financial statement exhibited into evidence bears the signature of the co-defendant, David W. George, as corporate officer. The discount furniture store went out of business sometime after the statement was received by Delmonico, and after Delmonico had shipped merchandise to it.

Upon the trial of the case, at the conclusion of the government's case, a motion for judgment of acquittal was made on behalf of all three defendants. The motion was granted as to the one co-defendant, Richard S. Morgan, and the trial then continued as to the charge against Petitioner and the co-defendant, David W. George.

QUESTION PRESENTED

1. Whether the government proved a *prima facie* case against petitioner in its case in chief.

2. Whether the petitioner waived his right to challenge the insufficiency of the government's case in chief, after his motion for judgment of acquittal was overruled and he went forward with evidence.

3. Whether the government ever proved the essential element of "mailing" as required in Section 1341, Title 18, of the United States Code.

STATUTES INVOLVED

Involved herein is simply Title 18, Section 1341, of the United States Code a copy of which statute is appended as Appendix III.

ARGUMENT

REASONS FOR GRANTING THE WRIT

The Government failed to prove a prima facie case in its evidence in chief.

The Petitioner, Marshall West, was convicted by a jury upon an indictment charging him with "Mail Fraud," which crime is established by 18 U.S.C. § 1341. The essential elements of a mail fraud offense are:

(1) A scheme devised by or knowingly and intentionally participated in by defendants

which is designed to defraud victims by false pretense or representations knowingly or intentionally made by defendants or authorized or ratified by them, and

(2) The use of the mails in furtherance

At the conclusion of the Government's case, the Petitioner Marshall West, moved the Court for a judgment of acquittal on the grounds that the Government had totally failed to prove the essential elements of the crime. This Court, after much deliberation, overruled this motion. Again, after all of the evidence was introduced, the Petitioner, Marshall West, again moved for a judgment of acquittal which motion was likewise overruled.

Counsel seriously impresses upon this Court the utter lack of proof on the part of the Government in its case against the Petitioner, Marshall West. The elements of the offense were absolutely not proved in the evidence of the Government that, in any way, incriminated this Petitioner. It might be worthwhile to review the evidence that was presented by the Government. In all, seven witnesses were called by the Government in an effort to prove their case. Their testimony will be reviewed in the order of their appearance.

John Blache: This witness was the national credit manager for the victim, Delmonico International Corporation. The sense of his testimony was that he received an order for merchandise from the West Virginia Discount Corporation accompanied by a financial statement. It was received on May 20, 1967. He doesn't know whether it was mailed or not mailed, since he did not have the envelope that the order or financial statement came in. He stated that it could have been hand delivered, although it came from the mail room and he more or less assumes that it was mailed and received in the mail. The financial statement showed that the company had assets, one of which was a building having a value of $40,000.00 with a mortgage of $12,500.00. He testified that based on the financial statement they shipped merchandise in the value of over $2,000.00.

COMMENT: It should be noticed that this witness' testimony as to the receipt in the mail of the financial statement is speculative. At most, the testimony would prove that the financial statement was received by Delmonico. This witness offered no evidence as to who sent the financial statement. The statement was introduced into evidence which showed that it purportedly bore the signature of David W. George. It also showed as a reference West, Blackshire and Goode, Law Firm.

Mr. Hansbarger: This witness' testimony was offered merely to introduce a specimen signature of the Defendant, David George. He gave no testimony in reference to the Petitioner, Marshall West.

James Coffeen: This was the postal inspector who investigated this case. He introduced into evidence a waiver signed by David George, which waiver was used to obtain another specimen signature of that defendant. He mailed the specimen signatures to the Post Office Department Crime laboratory. He gave no testimony in relation to Marshall West.

Mr. Parent: This witness was a handwriting expert employed by the Post Office Department. He testified as to handwriting comparisons and that the signature on the financial statement was the same signature contained in the specimens of David George. He offered no testimony in relation to Marshall West.

Bill Houck: This witness is the County Clerk of Wyoming County who testified that there were no deeds or deed of trust on record in the name of West Virginia Discount Corporation in Wyoming County. He gave no testimony in relation to Marshall West.

Minnie Stewart: This witness is the Assessor of Wyoming County, who testified that there was no property listed on the Land Book in the name of West Virginia Discount Furniture Company. She gave no testimony in relation to Marshall West.

Bonnie Patrick: This witness had been employed by West Virginia Discount Furniture Company around the first of April, 1967, as a secretary and bookkeeper. She testified that David George, Marshall West and Richard Morgan were her supervisors at her job. She had seen the original of the financial statement previously introduced into evidence. A copy of that statement was given to her to type. After typing it, she gave it to the Defendant, David George, to see if it was all right. He gave it back to her and told her to take it to Marshall West's office. She took it to Marshall West; and "he looked it over." She then had copies of the statement run on Mr. West's copying machine. She made eight copies and took them back to David George. Some of these copies were mailed out and some kept in the office. She doesn't know to whom they were mailed. She has heard of Delmonico Corporation but doesn't know if any of the copies were mailed to that company. She cannot remember making an envelope out to send anything to Delmonico. She stated that it took several days to prepare the statement and that all of the information for the statement was given to her by the Defendant, George. She doesn't recall if the original was signed

by anybody. She stated twice that West gave her no information to be put in this statement. Her testimony reflects that Marshall West was President of the West Virginia Discount Furniture Corporation and that he, at times, had come in and talked with David George while she was employed there. He never directed her to do anything. They had meetings at the discount store in which West, Morgan and George took part.

The only additional evidence that was presented by the Government was postal inspector, Coffeen, who testified as to a resume of an interview he had with Marshall West, in which West stated that he merely did the legal work for this company; that he was not aware of a financial statement being used; that he had never seen the financial statement in question before; that the corporation did not own any real estate nor did it have any profits or sales from February 29, 1967, until April 15, 1967; that David George conducted the corporation's business and that Bonnie Stewart was the secretary and treasurer of the corporation. Likewise, Coffeen testified as to a statement he had taken from David George, but said statement from George did not in any way incriminate Marshall West.

This was the sum total of the Government's case. At the conclusion of this evidence the Petitioner, Marshall West, moved for a judgment of acquittal. The trial Court commented that the only evidence there was involving Marshall West was that Bonnie Stewart, the secretary, took the financial statement to Mr. West's office. To incriminate Marshall West, a lawyer, by having looked at a certain financial statement, would put all attorneys in a serious position of incrimination at any time they looked at a document brought to them by a client. This is not the purpose and intent of the criminal statute involved in this case.

It is conceded by the Petitioner, Marshall West, that in considering a motion for judgment of acquittal, the Court must consider the evidence in the light most favorable to the

Government, considering all reasonable inferences from the evidence. We submit that no reasonable inference can be drawn from the mere evidence of "looking at" a financial statement. In *Pritchard v. United States,* 386 Federal 2nd 760 (8th Circuit), a conviction on mail fraud was sustained by the appeals Court. That Court, however, set out the two essential elements of mail fraud offenses which are cited above. The factual question involving use of the mails was clearly established, since advertisements had been used by the defendants requesting answers to certain offers or transactions. In talking about the scheme used in the *Pritchard* case, the Court said:

> "There is substantial evidence that each of the convicted defendants worked for a common purpose for a considerable time at the principal offices of the company at Las Vegas and St. Louis; that each assisted in closing deals, in some of which various defendants participated jointly; that representations made to victims were in all cases quite similar; that each defendant had full knowledge of the nature of the business; an adequate basis exists for an inference that each defendant knowingly and intentionally participated in the fraudulent scheme."

Nowhere in the case at bar can such facts be established from the evidence. There is no legitimate inference to be drawn from the meager evidence offered by the Government that Marshall West knowingly and intentionally participated in any fraudulent scheme. If a fraudulent scheme existed, it existed on the part of David George, and not upon the part of Marshall West. There is no evidence of any prearranged plan, no evidence of any previous transactions involving Marshall West, no evidence of Marshall West taking part in the business enterprise itself, and no evidence of any representations having been made by him to anyone. It seems clear that more than "looking at" a statement,

which may be false, is required in order to sustain a conviction or even to establish a prima facie case by the Government.

To like effect, see *United States v. Grow,* 394 Federal 2nd 182 (4th Circuit) (1968). In the *Grow* case, the Court stated:

> "One element of the offense defined by the mail fraud statute is that the mailing must be for the purpose of executing the fraud. (Citing case) Significantly, Grow alone was convicted on this count persumably because of his personal connection with the ownership and control of First Fidelity . . . Certainly there was no evidence that Grow himself mailed the letter. If the conviction on this count is to stand it must be on the theory that Grow directed Applegarth to mail the letter or that Grow was responsible for the act of one of his fellow participatns (in furtherance of the scheme if committed during the existence of the scheme and his participation therein). Applegarth was not named in the indictment as a defendant nor was he criminally charged with having devised or having participated in the scheme."

The Government offered the testimony of the secretary of the corporation in an effort to show that Grow had requested that certain false brochures be sent out to the victim in the case. Then the Court said:

> "The (lower) court ruled that these letters and bills from the Express Co. were admissable to prove that material was sent, but added; 'If you want to show that they were sent at the request of Mr. Grow, you have to produce someone to say they were.' Upon interrogation and cross examination, Mrs. Boulay (the secretary) could not testify from personal knowledge as to the receipt of any such request from Mr. Grow. Nor was any other witness produced to testify to such request. There was

> no evidence, other than Mrs. Boulay's letters noted above, pointing to the fact that Grow knew of the existence of the question-and-answer brochures by April 11, 1970. There may have been room to suspect that Grow then had such knoweldge, but mere suspicion is not to be substituted for evidence. No letters from Grow or his association were produced which could indicate a request for such brochures, and Mrs. Boulay testified that at no time did Mr. Grow ever call her and make such a request. There is no evidence that Culver or Mrs. Bouley sent the question-and-answer brochures to Applegarth at First Fidelity with a view to cause him to mail them to perspective or existing depositors. There is no evidence that Grow, up to that time, had ever discussed these brochures with Applegarth, with any of the defendants, or with any other person. Consequently, there being no evidence that Grow himself mailed the letter and brochure in question on April 9, 1970, the only basis for finding that Grow caused the mailing is to draw an inference, seemly wholly unsupported by evidence, that he had something to do with preparing or approving the brochure or authorizing or acquiesced in sending it to the various assoications which he owned or controlled with the expectation that the associations, in turn, would mail them out to prospective depositors."

The conviction of Grow was reversed.

Consider now the case of *Windsor v. United States,* 384 Federal 2nd 535 (9th Circuit 1967). In this case the defendant was an attorney practicing in Portland, Oregon. He had prepared various articles of incorporation for a real estate

corporation. Two of his co-defendants were incorporators and officers of this corporation. Windsor had a one-fourth (¼) interest in the corporation along with the other co-defendants. He signed salary checks and there was testimony that he held the office of President in the corporation and a member of its Board of Directors. This involved a scheme of selling real estate for the purposes of building homes. There were representations made to the various customers that utilities would be provided, roads would be paved, curbs were to be placed along the roads and various other like statements. The record was clear that none of these promises was ever met nor was there any intention to meet them. Note the Court's opinion in this case:

> "There is nothing but speculation to connect appellant with these on the scene representations. His knowing participation in a scheme to defraud is an essential part of the government's case . . . This element may be established circumstantially, but cannot be based on so called 'constructive' knowledge because of facts known to others with whom the appellant was involved in this scheme . . . A study of the record convinces us that the extent of his proved participation is as consistant with lack of knowledge as it is with knowledge. He, in fact, never went to the . . . site. While he ultimately received knowledge of the representation through complaints arriving at the 'home office' this was after the selling campaign had been concluded.
>
> "The Government, then, has failed to meet its burden of establishing the criminal intent essential to the crime of mail fraud.
>
> "Reversed."

The case at bar lacks any proof in the Government's case that Marshall West had any knowledge of any scheme being attempted by his co-defendant. There is no evidence that West approved or acquiesced in the scheme of mailing any financial statement to the victims in this case. Even if he had approved the financial statement, where is there any proof that Marshall West knew that this financial statement was going to be mailed to anyone? There is no evidence of any participation between him and George in the preparation or the intent to perpetrate a fraud. As the Court stated at the conclusion of the Government's case, the only participation whatsoever contained in the proof in this case is that Marshall West "looked at" the financial statement. Looking at a document does not prove any scheme no; does it prove that Marshall West had any way of knowing that the financial statement was going to be placed into the United States mails for any purpose.

ii.

Doctrine of Waiver Does Not Apply in This Case.

Counsel is not unmindful of the rule prevailing in many of the circuits court of appeal in this country, that has been called the "Waiver Doctrine." We are aware of *Lambert vs. United States* 101 F. 2d 960 and *Harris vs. United States* 285 F. 2d 85 (5th Cp.. 1960) and the many cases which adopt the view in those cases, providing for a waiver. of defendant's motion for judgment of acquittal, if the defendant proceeds to put on a defense after the motion is overruled. We are also aware of the many court of appeals decisions which provide that the motion must be reiterated after the conclusion of the defendant's case in order to preserve the original motion for acquittal. Nevertheless, we impose upon this Court the repudiation of this doctrine that has been announced in *Cephus vs. United States* 324 F. 2d 893 (D.C. Cir. 1963) and the apparent repudiation of the same doctrine by reason of the memorandum opinion in *Hemphill vs. United States*

312 U.S. 657, 61 S. Ct. 729, 85 L. Ed. 1106.

The Petitioner made his motion for judgment of acquittal in good fatih after the conclusion of the government's case. As stated before, the government's case did not establish prima facie proof of the violation of the mail fraud section of the United States Code. The Petitioner thereupon proceeded to present evidence, and this evidence in no way stregnthened the government's case. The elements of the offense were still completely lacking at the conclusion of the Petitioner's evidence. It might further be pointed out that Petitioner proceeded with his evidence first, simply because his name was first on the indictment and this court ruled that in the order of proof he would present his evidence before the Defendant, George. It was not until George took the stand in his case that the government's case at all became strengthened.

Rule 29A of the Federal Rules of Criminal Procedure provides in part:

> "The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment of information after the evidence or either side is closed if the evidence is insufficient to sustain a conviction of such offense or offense. If Defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

This rule appears to place upon the trial court the obligation and duty to direct a judgment of acquittal if the government's case is not sufficient. It is Petitioner's contention that the Court erred in not granting the motion at that time. In *Cephus* the Court said.

"Accordingly Rule 29A of the Federal Rules of

> Criminal Procedure provide that a motion for judgment of acquittal must be granted after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction. Denial of such a motion at the close of the Government's evidence is not immediately reviewable. Nevertheless, if the Defendant then rests or if he includes evidence which adds nothing to the evidence, the sufficiency of the government's case in chief may be reviewed on the appeal from conviction."

In a concurring opinion in the *Cephus* case it was stated "the fact that exculpatory evidence offered by his co-defendant implicated Petitioner in the crime and deprived Appellant of his rights under Rule 29A.

To deny the Petitioner the right to proceed with his evidence would in our judgment deprive the Petitioner of the right to a fair trial. It is the government's obligation to establish a prima facie case, before the Defendant should be required to go forward with his evidence. One Defendant in this case was discharged because of the insufficency of the evidence and he can never be tried again for this offense, even though it appeared from the testimony of the third co-Defendant, George that he was involved in the preparation of the financial statement. It would bewholly unfair and inequitable to say that he is discharged because of the court's mandatory action under Rule 29A, and then to turn around and deprive the Petitioner of a judgment of acquittal simply because he went forward with his evidence.

iii

The Government failed to Prove That the Financial Statement Was In Fact Mailed.

As stated before, one of the essential elements in proving the charge in the indictment in this case, found under 18 U.S.C.

Section 1341 is the use of the mails in furtherance of a scheme to defraud. There was very little evidence, if any, on the element of mailing. The government proved by conclusionary statements made by witnesses, over the objection of petitioner, that the financial statement had to have been mailed because it was received in New York State. The witness, John Blache, did not see any envelope nor did he actually see or know that the financial statement was received by his company in the mail. His testimony in this regard is as follows:

Q And did you bring with you the financial statement which you received from the West Virginia Discount Furniture Corporation?

A Yes, I did.

Q Do you have it with you, sir?

A Yes.

MR. KING: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. KING: May I have this document marked?

THE COURT: Let it be marked.

(Government's Exhibit Number 2 was marked for identification.)

BY MR. KING:

Q Mr. Blache, I hand you what has been marked as Government's Exhibit Number 2, and I ask you, sir, if that is the financial statement which you received from the West Virginia Discount Furniture Corporation?

A Yes, it is.

Q And when did you receive it, sir?

A In May of 1967.

Q And it came to you directly?

A It came to our company, yes.

Q Yes. And how was it conveyed to your company, sir?

A It came in the mail.

MR. CICCARELLO: I object, Your Honor. I think this man did not say he received it himself, because that would be an

assumption on his part.

THE COURT: Lay the foundation, if he knows, whether he knows whether it came through the mail or not by his own knowledge.

MR. KING: Yes, sir.

BY MR. KING:

Q I ask you if this document came directly to you?

A No, it did not.

Q How did it arrive at your company? Whose office did it come to in your company?

A Well, originally it came to our mail room, and the mail room opened it and then it was delivered to my office.

Q Is there any other way it could have gotten to your mail room other than by being delivered there by the United States Mail?

MR. CICCARELLO: I object to that, Your Honor.

THE COURT: Well, he can testify within his knowledge what he knows about it. Go ahead, Mr. Blache, and tell us what you know about it, how it got there.

THE WITNESS: Well, the only way it could have come would have been one of two ways. It could have been hand0delivered, or it could have been sent through the mail, and since I know very definitely of my own knowledge it wasn't hand-delivered it had to come through the mail.

MR. KING: I offer this document in evidence, Your Honor.

MR. CICCARELLO: I object, Your Honor.

THE COURT: Let counsel see it.

MR. ROLES: Your Honor, may we approach the bench, please?

(Thereupon, all counsel and the Court held a short off-the-record discussion at the bar of the court.)

THE COURT: Maybe we better go back in chambers.

(Thereupon, all counsel and all defendants retired to the Court's chambers, and the following proceedings were had:

MR. CICCARELLO: Your Honor, may I show my further objection to it coming in. I understand this is now offered into

evidence.

THE COURT: Oh, yes, you can object to it.

MR. CICCARELLO: Further, on the ground, if I may, sir, that the witness who is testiyfing now did not testify that this was received through the mail.

THE COURT: Well, that's a technical matter. I think, Mr. King, if you would go ahead and show that it was received – came to him through the ordinary course of business, that it would be sufficient.

MR. KING: I believe he already testified –

MR. CICCARELLO: I think he said it could have come two ways.

MR. KING: He said it couldn't have come otherwise.

THE COURT: I will admit this financial statement solely for the purpose of it showing the misrepresentation relating to this real estate and the items mentioned in the indictment.

MR. UPTON: Well, there will be certain elements about who signed ti. You don't want to confine it, of course, to –

THE COURT: Well, of course, who signed it, the signatures are on here.

Q You testified a moment ago that there were two ways that this document could have gotten into your mail room, one by the mails and one by being hand-delivered?

A That's right.

Q And you also said that you knew that it had not been hand-delivered.

A That is correct.

Q Would you elaborate on that?

A Well, I was employed by Delmonico in May, and in my previous employment it has always been my practice to secure the envelopes and attach them to the financial statements when they are received. When this was received it came to my attention probably that afternoon or the next day, so I went into the mail room and asked them if they had the envelope that this came with, and they said that it had –

MR. CICCARELLO: Objection.

THE COURT: Objection sustained.

MR. KING: You may not testify as to what they said to you.

THE COURT: Mr. Blache, did you get this statement – or did it come to your office through the regular course of business of your company?

THE WITNESS: Yes, it did.

THE COURT: Very well. We will receive it into evidence for the purposes I have outlined to the jury.

(Government's Exhibit Number 2 was received in evidence.)

Then in the cross examination of the witness:

Q So that you are, as a matter of fact, assuming that this particular financial statement came in the mail, are you not, sir?

A Well, the – since I don't open the mail myself I have to make an assumption, but the assumption is based on normal company procedure.

Q And what is that normal company procedure?

A That all correspondence that comes into the mail is opened by the mail room and is then delivered to the various departments that it pertains to. Anything that is hand-carried, it would be given directly to the person to whom it is addressed.

Q From the mail room?

A No, if somebody were to come in to the building and say, "I have a letter of credit to the Credit Department," they would just come into the Credit Department and hand it to them.

Q And you don't have the envelope in which this statement came to you?

A No, I do not.

Q And as I understood from your testimony you attempted to get one but you couldn't find it, is that correct?

A It was too late by that time, yes.

Q So you don't know from where that financial statement came do you?

A As I stated again the only way it could have come is either by being hand-delivered or by coming in the mail. I don't know of

any other way it could have come.

Q What I mean, sir, is you are not in a position to tell this Court and jury, for example, where the postmark was on the envelope?

A No, I'm not.

Q Or from whom a return address was on the envelope?

A Oh, very definitely not, no, sir.

The trial court indicated that he was permitting the exhibit and the proof of mailing to come into evidence because Blache's proof was based upon the usual and customary practices of the business of the witness. It appears to us that proof of an actual element of a crime cannot be substantiated by usual practices of a business, but must be direct, positive, clear and convincing. Such is not the case in the testimony of this witness.

The government further attempted to bolster the essential proof of mailing through Bonnie Patrick, who was formerly a secretary for the West Virginia Discount Furniture Corporation, and the person who actually prepared the financial statement which was alleged to be false. Her testimony reveals nothing that could be called proof of mailing. Certainly there are some innuendoes that would lead to a very weak conclusion that the financial statement could have been mailed but not that it was. Her testimony is as follows:

Q And then what did you do with them?

A Well, there was some mailed out, and there was a few that stayed in the office.

Q Some were mailed out to business concerns?

A Yes, sir.

Q Was this the normal procedure in the office, to mail such things as this to business concerns?

A Yes, sir.

MR. ROLES: Your Honor, –

Q Were any of these statements delivered to any concern by any other means than through the United States Mails to your knowledge?

A Not that I know of. No.

Q Some of them were mailed –

A Yes, sir.

Q – to your knowledge?

A Yes, sir.

Q How many?

A I don't know.

Q Did you mail them?

A I did mail some which I don't recall whom to, but I did mail some.

Q Do you recall a concern known as the Delmonico International Corporation?

A Yes. I recall that corporation.

Q Did it – in the performance of your duties for the West Virginia Discount Furniture Corporation, did you come to have knowledge of the Delmonico International Corporation?

A Yes.

Q Is that where you heard of the Delmonico?

A Yes, sir.

Q At your work?

A Yes, sir.

Q Did it do business with the West Virginia Discount Furniture Corporation?

A Yes, sir.

Q Did you prepare one of these statements to be mailed to the Delmonico International Corporation?

A I don't know whether I mailed one to them myself or whether I didn't, but I do know that I did mail some.

Q You mailed some?

A Yes, sir.

Q Well, when you say you mailed them, somebody else may have mailed or placed some of the mail in the depository?

A Yes, sir.

Q Did you prepare all of the information and things like that? I mean place the addresses on the envelopes and such as that for mailing?

A While I was at work, yes.

Q Do you recall having prepared an envelope for mailing for the Delmonico International Corporation for one of these financial statements?

A I can't say that I really remember making the envelope out to Delmonico, but I do remember the Delmonico International Corporation.

This was the entire testimony offered by the government in relation to the question presented herein. Assumptions are made in the testimony which lead only to surmise or speculate that the financial statement was deposited in the United States mails. There was other proof, however, offered in this case by the defendants below which likewise could lead to the conlcusion that the financial statement was not in fact mailed.

Testimony was given that some time prior to May, 1967, petitioner's two co-defendants had traveled to High Point, North Carolina to attend a furniture mart. At that time one of the witnesses, Richard Morgan, testified that he and David George, the other defendant, took a financial statement with them for the purposes of obtaining credit at the mart. Defendant George testified that while at the mart they talked with a sales representative of the Delmonico International Corporation, the victim in the case. The inference from the testimony of both of these defendants was that the financial statement exhibited in evidence could have been delivered to this sales representative of the victim, personally. If this were the case then of course the United States mail was not used in transmitting the financial statement. The testimony of edfendant George is revealing in this regard!

THE COURT: Now, this indictment charges that "on the 20th day of May, 1967, in the Southern District of West Virginia, in furtherance of this scheme to defraud the Delmonico, that this financial statement was – that you mailed this financial statement

or caused it to be mailed to Delmonico in New York through the United States Mails." Did you mail it?

THE WITNESS: No, sir.

THE COURT: Did you instruct anyone to mail it?

THE WITNESS: No, sir.

THE COURT: Do you know whether it was mailed?

THE WITNESS: No, sir.

THE COURT: When you were in High Point you did talk to a representative of Delmonico?

THE WITNESS: Dick and I talked with a salesman.

THE COURT: And you gave him an order for this merchandise at that time?

THE WITNESS: Dick gave him an order for it.

THE COURT: Well, were you there?

THE WITNESS: When he gave the order?

THE COURT: Yes.

THE WITNESS: No, sir.

THE COURT: Did you know the order was given down there when you were down there?

THE WITNESS: Yes, sir. After we got back Dick had – you see, when you make an order they give you a copy.

THE COURT: Well, when did you first learn that this order had been placed with Delmonico?

THE WITNESS: After it was ordered.

THE COURT: And at High Point, or after you got back to Pineville?

THE WITNESS: I think it was on our way back from High Point. We were going over the order sheets.

THE COURT: On your way back you learned from Mr. Morgan that he had ordered this merchandise from Delmonico?

THE WITNESS: Yes, sir.

THE COURT: Well, did you hear – didn't you testify something about a Delmonico man there at High Point said he would have to have a financial statement?

THE WITNESS: Yes. Right. He told Dick that and several of the other people that I talked to told me that.

THE COURT: Well, were you present when he told Dick? How do you know he told Dick that?

THE WITNESS: Dick told me.

THE COURT: Oh, you get it from him?

THE WITNESS: Yes, sir.

THE COURT: You don't know then from your own knowledge whether Delmonico –

THE WITNESS: No, sir.

THE COURT: – told Dick that they would have to have a financial statement?

THE WITNESS: No, sir.

and then further in his testimony, the following is found.

Q There was something else I wanted to ask you, too. When you were down to the furniture mart at High Point you testified that you met a salesman there for Delmonico International?

A No, sir. Met a salesman that represented Delmonico.

Q A salesman that represented – you mean a factory representative, is that what they call them?

A Yes, sir.

Q And that man's name was Steven Kutos, wasn't it?

A I don't know. I don't recall what his name was, sir.

Q You learned later, as I understand, that a financial statement was necessary to obtain furniture

A Yes, sir.

Q Obtain purchases of furniture?

A Yes, sir.

Q So that if in fact you had a financial statement at High Point, North Carolina, when you went down there that would have – either you or Mr. Morgan – that could have been supplied at that time, couldn't it?

A Yes, sir.

It is therefore petitioner's position that the mailing of the alleged financial statement was not proved by the government, nor was it proved by taking the case as a whole.

CONCLUSION

Petitioner was convicted by a jury on evidence that was wholly insubstantial. Certainly the government's case in chief was based solely upon the fact that petitioner, a lawyer, had looked at a financial statement which apparently was fraudulent. No evidence was offered to prove any scheme participated in by petitioner nor was there evidence in the government's case in chief that petitioner knew or had reason to know that the financial statement that he looked at was going to be mailed to anyone. The indictment in this case charged a scheme or device to defraud charged by Delmonico International Corporation. Proof did not substantiate such a scheme, artifice or device. The testimony only proved that financial statements were mailed to some one but not specifically to the named persons in the indictment.

Petitioner therefore respectfully submits that this petition for a writ of *certiorari* should be granted.

LEWIS, CICCARELLO, MASINTER & FRIEDBERG

by Arthur T. Ciccarello
Attorney for Petitioner

Sixth Floor, L & S Building
Charleston, West Virinia

APPENDIX I

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 71-1076

United States of America, Appellee

versus

David W. George, Appellant

No. 71-1077

United States of America, Appellee,

versus

Marshall G. West, Appellant.

Appeals from the United States District Court for the Southern District of West Virginia, at Bluefield, Sidney L. Christie, District Judge.

(Argued June 11, 1971 Decided July 12, 1971)

Before BRYAN, WINTER and RUSSELL, Circuit Judges.

Forres H. Roles (Jackson, Kelly, Holt & O'Farrell) for Appellant in No. 71-1076; Arthur T. Ciccarello (Angel, Lewis, Ciccarello & Masinter) for Appellant in No. 71-1077; W. Warren Upton, United States Attorney (Robert B. King, Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

Upon consideration of the record, the brief filed on behalf of each appellant, the oral arguments presented by counsel for each

individual appellant, the joint appendix, the brief of the United States, and oral argument of the United States Attorney in these consolidated appeals, we find no error and affirm the judgments below.

AFFIRMED.

APPENDIX II

Section 1341-Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfiet or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spruious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or improsoned not more than five years, or both.

Supreme Court, U.S.
FILED
SEP 15 1971
E. ROBERT SEAVER, CLERK

No. 71-216

In the Supreme Court of the United States

OCTOBER TERM, 1971

MARSHALL G. WEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported (Pet. App. I).

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1971. The petition for a writ of certiorari was filed on August 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support the conviction.

423-023—71

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted of mail fraud in violation of 18 U.S.C. 1341 and sentenced to eighteen months' imprisonment. The court of appeals affirmed, *per curiam* (Pet. App. I).

The government's evidence showed that petitioner and co-defendants David George and Richard Morgan were principal stockholders and officers of the West Virginia Discount Furniture Corporation located in Pineville, West Virginia (Tr. 4–5(a)). Mrs. Bonnie Patrick, the corporation's secretary, testified that she typed a financial statement for the corporation and, at George's direction, took it to petitioner's office and waited there while he looked it over (Tr. 82–83, 84–87). The statement showed the corporation's ownership of a parcel of land which in fact it did not own (Pet. 2, Tr. 76–77, 79–80, 131–132, 186).

Some copies of the statement were placed in the mail. One copy of the statement was received by the Delmonico International Corporation, which, on the basis of the financial statement it received, shipped merchandise to Discount Furniture on credit (Tr. 20, 22). Mrs. Patrick could not recall whether she had mailed a copy of the financial statement to Delmonico (Tr. 88, 90). John Blache, Delmonico's credit manager, testified that Discount Furniture's financial statement came to him from the company's mail room (Tr. 8). He conceded the possibility that the statement could

have been delivered to Delmonico, as he personally did not open the mail (Tr. 6, 9, 20, 32), but testified that, in normal company procedure, all correspondence is opened by personnel in the mail room and is then delivered to the addressee. Anything hand delivered would have been given directly to the addressee by the person delivering it (Tr. 31).

Petitioner's motion for judgment of acquittal at the close of the government's case was denied. Co-defendant George then testified that in April 1967 he learned that a financial statement showing the assets and liabilities of the corporation was necessary to secure credit in the corporation's name. George testified that neither he nor co-defendant Morgan knew how to prepare such a statement, but that petitioner had said that "he'd get one fixed up for us." Shortly thereafter petitioner gave George a draft statement which he had prepared. Petitioner told George to have the corporation's secretary type up the draft. He said that the statement "would get us credit anywhere" (Tr. 234–235). When George asked petitioner about the real estate, petitioner said that he owned the building and that "nobody would ever say anything about it anyway" (Tr. 236).

ARGUMENT

Petitioner argues that, at the close of the government's case, there was insufficient evidence to show his implication in the fraud and, in addition, that he should not be deemed to have waived the motion to acquit by putting on an affirmative case. As petitioner

acknowledges, his assertion with respect to waiver is contrary to the general rule.[1] In any event, evidence of petitioner's interest in the corporation and of his checking over the false statement and indicating his recognition of its falsity were sufficient to make out a *prima facie* case. With respect to the mailing, the sufficiency of the proof of which petitioner challenges, proof may be made either by direct or circumstantial evidence. *United States* v. *Hopkins*, 357 F.2d 14 (C.A. 6); *Whealton* v. *United States*, 113 F.2d 710, 713 (C.A. 3). In light of Mrs. Patrick's testimony concerning the mailing of some of the copies and Blanche's testimony about the receipt of the financial statements, there was ample circumstantial evidence from which the jury could reasonably have inferred fraudulent use of the mails.

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[1] In *Cephus* v. *United States*, 324 F.2d 893 (C.A.D.C.), relied on by petitioner, the court was concerned with circumstances in which a defendant, in seeking to explain, impeach or rebut his co-defendant's testimony, "overshot" his mark and tended to cure a deficiency in the government's case. The court in *Cephus* recognized the continuing validity of the waiver doctrine but objected to its application under those circumstances.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
PETER A. CHAPIN,
Attorneys.

SEPTEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971